

**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA**

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**The State of North Dakota,**     )  
  )  
Plaintiff and Appellee,        )  
  )  
vs.                                    )  
  )  
**Thomas Gunder Ruud,**            )  
  )  
Defendant and Appellant.        )

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**Supreme Court No. 20050314**

**District Court No. 18-05-K-1001**

ON APPEAL FROM CRIMINAL JUDGMENT  
FROM THE DISTRICT COURT  
FOR THE NORTHEAST CENTRAL JUDICIAL DISTRICT  
GRAND FORKS COUNTY, NORTH DAKOTA  
THE HONORABLE LAWRENCE JAHNKE, PRESIDING.

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**BRIEF OF APPELLEE**

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
STATEMENT OF THE ISSUE.....	iii
STATEMENT OF THE CASE .....	¶1
STATEMENT OF THE FACTS.....	¶2
ARGUMENT .....	¶7
<b>I.    THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN           IT PROPERLY ADMITTED TESTIMONY THAT WAS NON-           HEARSAY IN NATURE.....</b>	<b>¶7</b>
A. <u>The District Court Did Not Abuse Its Discretion When Admitting Non-               Hearsay Testimony Regarding Inventory Records.....</u>	<u>¶8</u>
B. <u>The District Court Did Not Abuse Its Discretion When Admitting Non-               Hearsay Testimony Regarding Videotape Evidence.....</u>	<u>¶9</u>
<b>II.   THE DISTRICT COURT PROPERLY CONVICTED THE           DEFENDANT OF THEFT OF PROPERTY WHEN SUBSTANTIAL           EVIDENCE WAS PRESENTED AT TRIAL WARRANTING SUCH A           CONVICTION.....</b>	<b>¶12</b>
CONCLUSION .....	¶14

## **TABLE OF AUTHORITIES**

### **NORTH DAKOTA STATE CASES**

State v. Erickstad, 2000 ND 202, 620 N.W.2d 136.....¶7

State of North Dakota v. Kunkel, 548 N.W.2d 773 (N.D. 1996).....¶12

### **NORTH DAKOTA RULES OF THE COURT**

N.D.R.Evid. 801(a).....¶¶ 7,11

N.D.R. Evid.801(c).....¶7

### **STATEMENT OF THE ISSUES**

- I. Whether the District Court abused its discretion when it admitted testimony at trial that was non-hearsay in nature?**
- II Whether the District Court properly convicted the Defendant of Theft of Property when substantial evidence was presented at trial warranting such a conviction?**

### **STATEMENT OF THE CASE**

[¶1] Thomas Gunder Ruud (Mr. Ruud and Defendant herein), appeals from a judgment of criminal conviction in the District Court of Grand Forks County. Mr. Ruud was found guilty of Theft of Property on August 12, 2005. (Appellant's App. at 8). The criminal judgment was entered on August 12, 2005 and reflected the Defendant's sentence of five (5) years with the Department of Corrections to serve in the North Dakota State Penitentiary with one (1) year to be suspended and credit of one hundred and thirty-two days (132) of time served. (Appellant's App. at 8). Notice of Appeal was entered on September 8, 2005. (Appellant's App. at 10).

### **STATEMENT OF THE FACTS**

[¶2] In the Spring of 2005, upper level employees of Orton's Convenience Stores began an investigation into inventory shortages occurring at the Orton's Southtown located at 2002 South Washington Street. (Trial Tr. at 12). Sid Olson, operations manager for Orton's Convenience Stores and two of his employees, Kevin Olson and Angela Messer, both District Supervisors, viewed store videos and compared paperwork to further investigate the shortages and determined the store was short approximately \$3,062. (Trial Tr. at 13 and 18). Pursuant to that investigation, it was determined that the shortages that were occurring coincided with one specific employee's shift. (Trial Tr. at 12). That employee was Thomas Ruud, who had been employed with the store part-time since January 21, 2005. (Trial Tr. at 13 and 47). After reviewing the videos and journal tapes, Sid Olson and his employees set up a meeting with Cathy Springer, the Orton's Southtown store Manager, and Mr. Ruud. (Trial Tr. at 13).

[¶3] On March 21, 2005, Cathy Springer, Sid Olson, Kevin Olson, and Angela Messer met with Mr. Ruud at the Orton's Southtown location. (Trial Tr. at 50). Sid Olson spoke with Mr. Ruud regarding his knowledge of the inventory shortages. (Trial Tr. at 14). During this conversation, Mr. Ruud admitted to stealing \$3,000 of the store's funds. (Trial Tr. at 14-17). Mr. Ruud then voluntarily wrote a statement admitting to stealing the items. (Trial Tr. at 20), (Appellee's App. at 1). Subsequent to Defendant's confession, he was informed that the statement would be forwarded to Tim Orton, the owner of Orton's Convenience Stores, in order to determine if he was interested in pursuing criminal charges. (Trial Tr. at 20-21).



[¶4] On March 23, 2005, Officer Kraft of the Grand Forks Police Department was dispatched to Orton's 2002 South Washington Street for a complaint regarding a theft of property. (Trial Tr. at 4-5). After arriving on scene, Officer Kraft was met by Cathy Springer, a manager of the store at that location. (Trial Tr. at 5). Ms. Springer informed the officer that an employee of the store, Mr. Ruud, had been witnessed stealing items during his shifts. (Trial Tr. at 5). Furthermore, Ms. Springer provided Officer Kraft with a copy of a confession written by Mr. Ruud admitting to stealing approximately \$3,000 from the store. (Trial Tr. at 5). After further investigation and consultation with the State's Attorney's Office, Mr. Ruud was arrested for Theft of Property.

[¶5] A bench trial was conducted on August 12, 2005 with the Honorable Judge Lawrence Jahnke presiding. Prior to trial, Mr. Simonson, Mr. Ruud's attorney, filed a Subpoena Duces Tecum upon Ms. Cathy Springer ordering production of all video tapes or business records that implicated his client. (Appellant's App. at 6-7). Pursuant to the subpoena, Ms. Springer made all requested items available to Mr. Simonson and Mr. Ruud at the August 12, 2005 bench trial. See (Trial Tr. at 26 and 41). Furthermore, prior to the trial Mr. Simonson did have possession of and opportunity to view the videotapes that depicted his client stealing from the store. (Trial Tr. at 69 and 82).

[¶6] After hearing the testimony of Orton's employees and Mr. Ruud, as well as

reviewing Mr. Ruud's signed confession, Judge Jahnke found the Defendant to be Guilty of the crime of Theft of Property and subsequently sentenced the Defendant to serve five (5) years with one (1) suspended with the Department of Corrections in the North Dakota State Penitentiary. (Appellant's App. at 8).



## ARGUMENT

### **I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT PROPERLY ADMITTED TESTIMONY THAT WAS NON- HEARSAY IN NATURE.**

[¶7] Rule 801 of the North Dakota Rules of Evidence define hearsay as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. N.D.R. Evid.801(c). Furthermore, a statement is defined as an oral or written assertion or nonverbal conduct of a person, if it is intended by the person as an assertion. N.D.R.Evid. 801(a). In the case at hand, the Defendant alleges that the District Court erred when it overruled objections made by Defense counsel regarding testimony provided by Orton's Southtown Employees. A trial court has broad discretion over evidentiary matters, and the Supreme Court will not overturn a trial court's decision to admit or exclude evidence unless the trial court abuses that discretion. State v. Erickstad, 2000 ND 202, ¶34, 620 N.W.2d 136. A trial court abuses its discretion only when it acts in an arbitrary, unreasonable, or capricious manner or misinterprets or misapplies the law. Id.

#### **A. The District Court Did Not Abuse Its Discretion When Admitting Non-Hearsay Testimony Regarding Inventory Records.**

[¶8] In the instant case, it was not an abuse of discretion for the District Court to

overrule the Defense attorney's hearsay objections regarding references to inventory records because such objections were made to testimony that was non-hearsay in nature. At trial, testimony was provided by several Orton's Southtown employees, including Sid Olson, Kevin Olson, Angela Messer, and Cathy Springer. These individuals testified regarding their first hand knowledge of the theft that took place at the store and the losses the store had incurred. While explaining that they had personally become aware of the losses by reviewing the inventory records and videotapes of the stores, Mr. Simonson objected to the testimony as hearsay. See (Trial Tr. at 12, 13, 18, and 29). For example, during the testimony of Sid Olson, the operations manager for Orton's Convenience Stores, the following occurred:

Q: What did you do when you were provided with the information on that inventory shortage?

A.: We checked videos of what was going on in the store. First of all we double checked the paperwork which we always do to make sure everything matches with what was store level versus the office level and that matches. And then as we do in all cases where there are shortages we look into the individual goings on in the store.

In this case we looked at video and journal tapes to coincide with the video and discovered there was a problem on Tom, Thomas's shift.

Mr. Simonson: Now object on the basis of hearsay on that.

The Court: Overruled.

See (Trial Tr. at 12). The District Court properly overruled each of the Defendant's objections as based on definitions set forth in the North Dakota Rules of Evidence, these statements were non-hearsay in nature. At no time did the State offer to introduce the

written inventory records at trial. Mr. Simonson alleges that testimony, such as Mr. Sid Olson's as outlined above, constitutes hearsay because the witness was not involved in compiling the records. However, as is illustrated above, Mr. Sid Olson merely made reference of how he, as an operations manager for Orton's Convenience, personally became aware of shortages at the Orton's Southtown location. This testimony does not purport to offer any out of court statements, such as written inventory records, for the truth of the matter asserted. Although Mr. Simonson asserts that such records should have been submitted to avoid any hearsay issues, the State would submit that offering such records would have in fact created a true hearsay objection. The State was not required to introduce such records. The Defendant had access to the records pursuant to the Subpoena Duces Tecum and could have offered them into evidence if he chose to do so. Despite the Defendant's allegations that he did not have an opportunity to review and cross examine the materials, the transcript does reflect in several instances that the witnesses had produced such materials for the Defendant's review. See (Trial Tr. at 26 and 41). Considering the wide discretion a trial court is given in ruling on evidentiary matters as set forth by this Court in Erickstad, the District Court did not abuse its discretion when overruling the Defendant's objections to testimony which was non-hearsay in nature regardless of if such written records were offered into evidence at trial.

B. The District Court Did Not Abuse Its Discretion When Admitting Non-Hearsay Testimony Regarding Videotape Evidence.

[¶9] The District Court did not abuse its discretion in overruling the Defendant's hearsay objections regarding testimony referencing to store videotapes. At trial, witnesses testified regarding how they became suspicious of the Defendant and referred to the videotapes of his shift. These individuals testified to having viewed the tapes and witnessed Mr. Ruud stealing items from the store. See (Trial Tr. at 32). Once again, the State did not offer the videotapes implicating Mr. Ruud. Mr. Simonson alleges in his brief that the Defense lacked the opportunity to review the information that the witnesses referred to. (Appellant's Brief at 6). However, Mr. Simonson specifically stated at trial that he had spent numerous hours extensively reviewing the videotapes prior to trial. See (Trial Tr. at 82). In response to how many hours Mr. Simonson had worked on this case, he states "Volumes. I could add it up but I am sure it's over 25 hours already. I couldn't tell you. I mean because we have time viewing tapes is considerable amount itself and." See (Trial Tr. at 82). The Defendant himself also indicates that he had an opportunity to review the tapes prior to trial. (Trial Tr. at 69). Mr. Simonson clearly could have offered these videotapes at trial if he chose to do so.

[¶10] With respect to the hearsay concerns, no out of court statements offered to prove the truth of the matter asserted were offered at trial by the State in regards to the videotapes. The videotapes themselves were not admitted and were only referenced to by witnesses in respect to how they personally became aware of the theft. In fact, after a



Careful review of the transcript, it appears the only witnesses for the State in which the content of the videotape was discussed were during the direct examinations of Kevin Olson and Angela Messer. (Trial Tr. at 32 and 43-44). The Defense attorney at those times made no objection. (Trial Tr. at 32 and 43-44). The only other instances in which the specific content of the tape was discussed by any witnesses was actually elicited by the Defense attorney himself. See (Trial Tr. at 26-27 and 55). In fact, although there were numerous hearsay objections made by Defense counsel at trial, the only valid hearsay objection made by Mr. Simonson was sustained by the District Court. See (Trial Tr. at 49).

[¶11] Further, as defined by Rule 801(a) of the North Dakota Rules of Evidence, the Defendant's actions on the tape likely would not even constitute a "statement" within the bounds of hearsay as the Defendant was not intending to make an assertion when being incidentally taped on video while stealing from his employers. N.D.R.Evid. 801(a). Therefore, the District Court's decision to overrule the Defendant's hearsay objections was in accordance with the evidentiary rules and was not an abuse of discretion.

**II. THE DISTRICT COURT PROPERLY CONVICTED THE DEFENDANT OF THEFT OF PROPERTY WHEN SUBSTANTIAL EVIDENCE WAS PRESENTED WARRANTING SUCH A CONVICTION.**

[¶12] In reviewing the sufficiency of the evidence to convict, the Supreme Court of North Dakota looks only to the evidence most favorable to the verdict and the reasonable inferences therefrom to see if there is substantial evidence to warrant a conviction. State of North Dakota v. Kunkel, 548 N.W.2d 773 (N.D. 1996). A conviction rests upon insufficient evidence only when no rational fact finder could have found the defendant guilty beyond a reasonable doubt after viewing the evidence in a light most favorable to the prosecution and giving the prosecution the benefit of all inferences reasonably to be drawn in its favor. Id. Furthermore, the Court does not weigh conflicting evidence, nor does it judge the credibility of the witnesses. Id. at 774.

[¶13] In the case at hand, the Defendant alleges that the trial court abused its discretion in finding the Defendant guilty of Theft of Property beyond a reasonable doubt. However, as the Court noted in Kunkel, the standard of review in such allegations is whether there is substantial evidence to warrant a conviction viewing the evidence in the light most favorable to the prosecution. In this case, substantial evidence was presented at the trial level warranting a conviction. Four upper-level employees of Orton's Convenience Stores testified that they personally noted shortages of approximately \$3,000 which coincided with Mr. Ruud's shift. These individuals reviewed inventory records and videotapes which corroborated their suspicions that Mr. Ruud was in fact the individual stealing from the store. During a meeting with the four employees, Mr. Ruud

himself admitted to stealing approximately \$3,000 of merchandise, a figure he calculated on his own. Mr. Ruud wrote a written confession which was entered into evidence at trial. See (Appellee's App. at 1). Mr. Simonson made no objection at trial or pre-trial to this written confession, despite implying that it was made under coercive circumstances. See (Trial Tr. at 19). Viewing this evidence in the light most favorable to the prosecution, a reasonable fact finder clearly could and would find a defendant guilty of Theft of Property under these circumstances. Because there was substantial evidence presented at trial warranting the Defendant's conviction, the District Court's guilty verdict should be affirmed.



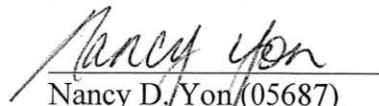
CONCLUSION

[¶14] Therefore, the State respectfully requests this Court affirm the decisions of the District Court in overruling the Defendant's hearsay objections and convicting the Defendant of Theft of Property.

Dated this 14<sup>th</sup> day of February, 2006.



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